88-534 (1)

Supreme Court, U.S.
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SEP 24, 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIM SHOULDERS; HAROLD HAMMONS; BEVERLY JACKSON; TROY BEAN; JEROME CASSELL; STEVE COURTNEY; WAYNE TRAVIS; AND BUD WALTMON

APPELLANTS

VS.

MCCRACKEN COUNTY, KENTUCKY; JOHN HARRIS; FRED AUSTIN; WAYNE LINDSEY; AND DANNY ORAZINE

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

JURISDICTIONAL STATEMENT

Counsel of record for appellants:

Stanley K. Spees
P.O. Box 2806
Paducah, Kentucky 42002
(502) 443-8263

591P

QUESTIONS PRESENTED

The sole question presented by this appeal is whether equal protection has been denied taxpayers by a state statute and a county ordinance based thereon which impose what purports to be a county-wide occupational tax, but which grants an exemption (or "credit") to workers who are subject to a similar occupational tax imposed by a city within the county, when county services are provided on an equal basis to both city and non-city residents, and the city neither makes financial contribution to county government nor provides services in lieu of county services.

LIST OF PARTIES

The parties to this proceeding in the Supreme Court of Kentucky are those listed in the caption hereof.

In the trial court the Commonwealth of Kentucky was also named as a defendant because the case draws in question the constitutionality of a state statute, *viz.*, Ky. Rev. Stat. § 68.197. The Commonwealth, through its Attorney General, filed in that court a "Notice of Attorney General of Intent Not to Intervene or Motion to Dismiss." See Appendix at pages xix to xx. The trial judge followed with an order dismissing the Commonwealth from the action. However, in compliance with Rule 28.4(c) of this Court, the appellants state that 28 U.S.C. § 2403(b) may be applicable.

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REFERENCE TO OPINIONS

This appeal is from an opinion of the Kentucky Supreme Court rendered on June 30, 1988 in case number 87-SC-797-TG, styled *Shoulders, et al. v. McCracken County, Kentucky, et al.* That opinion, which was ordered not to be published, is appended hereto at pages i to v. Previously, the McCracken Circuit Court, which was the trial court, had rendered "Conclusions of Law" and "Order and Judgement" in a single document on September 14, 1987. The trial court's opinion is likewise not officially reported, and is appended hereto at pages vix to xvi.

STATEMENT OF GROUNDS FOR JURISDICTION

This case comes before the Court on appeal from the Supreme Court of Kentucky regarding its memorandum opinion rendered on June 30, 1988. In that case the appellants alleged, *inter alia*, that section 68.197(4) of the Kentucky Revised Statutes, and an occupational tax ordinance of McCracken County, Kentucky, based thereon, violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution. The Kentucky court upheld the validity of the statute, thereby necessarily holding that the Fourteenth Amendment was not violated. In other words, notwithstanding the Court's interpretation of the Kentucky constitution,a determination that the statute also complies with the Fourteenth Amendment to the United States Constitution had to be made in order for the validity of the statute to be upheld. The appellants filed a Notice of Appeal in the Kentucky Supreme Court on August 31, 1988. Jurisdiction is conferred upon this Court by 28 U.S.C. 1257(2). Such jurisdiction is supported by *R.J. Reynolds Tobacco Co. v. Durham County* (1986, U.S.), 93 L.Ed.2d 449, 107 S.Ct. 499, and *Japan Line, Ltd. v. County of Los Angeles* (1979, U.S.), 60 L.Ed.2d 336, 99 S.Ct. 1813, which hold that an appeal may be taken to this Court when a federal constitutional question is specifically placed in issue in the state courts, and their ruling is in favor of the challenged statute's validity. See also *Cissna v. Tennessee* (1918), 246 U.S. 289, 62 L.Ed. 720, 38 S.Ct. 306, which likewise supports the jurisdiction of this Court when the state court could not have reached the decision it did without deciding a federal constitutional question adversely to the appellants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ky. Rev. Stat. § 68.197 (1986).

See Appendix for text at pages xxi to xxii.

McCracken County, Kentucky, Ordinance No. 86 (October 23, 1986).

See Appendix for text at pages xxiii to xxxiv.

STATEMENT OF THE CASE

On October 23, 1986, the Fiscal Court (governing body) of McCracken County, Kentucky, enacted an occupational tax and business license ordinance, pursuant to authority granted by Kentucky Revised Statutes § 68.197(4) (as revised July 15, 1986). The amount of the tax was fixed at one per cent (1%) of the gross wages of employed persons and one per cent (1%) of the net profits of firms and persons engaged in business for themselves. The ordinance became effective on January 1, 1987. The proceeds were designated for the county's general fund, but the appellees publicly stated on numerous occasions that the primary use of the money would be to build a new jail which would house prisoners arrested anywhere in McCracken County.

For a number of years prior to enactment of the McCracken County occupational tax ordinance, the City of Paducah, which lies in its entirety within the boundaries of McCracken County, has had in effect an occupational tax of its own. The amount of the Paducah tax is one and one-half per cent (1 1/2%) of the gross wages of persons employed within the city, but the percentage of net profits exacted from businesses and self-employed individuals varies by occupation. The newer McCracken County ordinance provides that occupational taxes paid to the City of Paducah may be credited against the amount which would otherwise be due to the county. Because the city's tax is set at a higher percentage of income than the county's, the effect of the credit is to relieve from county tax liability virtually all of those persons who work inside the city limits of Paducah.

Approximately one-half of McCracken County's inhabitants reside within the City of Paducah, although a significantly larger percentage work inside the city . Under Kentucky's city-county structure, every person residing in the Commonwealth

is a citizen of a county, and those persons residing inside the limits of a city are also citizens of that city. That is to say, the geographic area of a city is not subtracted from a county, but remains a part of it. County residents who live inside the city are entitled to exactly the same county benefits and privileges as county residents who live outside the city. Municipal benefits and privileges are available to city residents over and above county benefits and privileges. Thus, in the instant case, that half of McCracken County's population residing in Paducah receives all the advantages enjoyed by the other half of McCracken Countians (i.e., county-provided benefits), plus those afforded by the City of Paducah. McCracken County residents living outside Paducah receive only the former.

The appellants herein are persons who are employed or engaged in business for themselves in that part of McCracken County which lies outside the City of Paducah. They filed a complaint in the McCracken Circuit Court on March 31, 1987 against McCracken County and the individual members of the Fiscal Court, alleging that the tax credit contained in the McCracken County ordinance violates several sections of the Kentucky constitution and, in numerical paragraph 15 of the complaint, that it also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Appendix at pages xxxv to xxxix for copy of complaint.

On September 14, 1987, the trial judge entered an "Order and Judgment," with "Conclusions of Law" contained in the same document, rejecting the appellants' arguments and dismissing the complaint. See Appendix at pages vix to xvi. Even though the order focused primarily on the Kentucky constitution, the judge specifically found that the Fourteenth Amendment to the United States Constitution had not been violated. See Appendix at page xv. Such a finding was made by implication in any event, since the appellants would have been entitled to a judgment if they were deprived of Fourteenth Amendment equal protection, regardless of what the Kentucky constitution might provide.

On October 12, 1987, the appellants filed in the McCracken Circuit Court a Notice of Appeal, stating their intention to appeal the lower court's decision to Kentucky's intermediate appellate court, the Court of Appeals. The appellants specified in the notice that one of the issues of the appeal was the trial judge's ruling that the United States Constitution had not been violated. See Appendix at page xli. The appellees responded with a motion to transfer the case to the Kentucky Supreme Court, which was granted on December 17, 1987.

Once transferred, the issues were thoroughly briefed by the parties. The appellants again raised the issue of Fourteenth Amendment equal protection, although the bulk of their brief addressed violations of the Kentucky constitution. They pointed out that Kentucky courts have consistently held that § 171 of the Kentucky constitution, which requires uniformity of taxation within the territorial limits of the authority imposing the tax, should be measured by the same standards as the equal protection clause of the United States Constitution. In order to avoid duplication of argument in the portion of their brief concerning the Fourteenth Amendment, the appellants simply pointed out in that portion that they had been denied equal protection by the appellees, and indicated that the legal basis for their position was the same as for denial of their rights under the similar state constitutional provision.

The issues of the appeal were collectively passed upon in summary fashion by the Kentucky Supreme court when it stated in its memorandum opinion that the statute in question "is but a well reasoned effort at equality." In listing the grounds of the appellants' challenge, the Kentucky court included "that workers outside the city limits of the City of Paducah are being denied equal protection under the Fourteenth Amendment to the United States Constitution." See Appendix at page ii. Obviously disagreeing with the decision of the Kentucky Supreme Court, the appellants brought this appeal.

REASONS FOR PLENARY CONSIDERATION

The reason this case requires plenary consideration is best summarized by Justice Vance of the Kentucky Supreme Court in the last sentence of his dissenting opinion. There he said, "Once the legislature is allowed to encroach against the fundamental principle of uniformity in the application of laws to the citizens of this Commonwealth, there is no end to the possibilities of special treatment rather than uniformity under the law." See Appendix at page viii. From the outset the appellants in this case have sought nothing but fairness. To require them to pay a tax not required of others identically situated, except for location of the others' places of employment inside a city which happens to have a similar tax for its own uses, is to violate the bedrock principle of equality embodied in the Fourteenth Amendment.

The appellees, in formulating the tax credit in issue, have acted out of a desire to avoid a tax increase for *part* of their constituency. What they have failed to recognize is that the benefits derived from McCracken County tax dollars devolve alike upon *all* of their constituency. What they have also failed to recognize is that the benefits derived from the City of Paducah tax -- the tax for which they require a credit -- do not lessen the McCracken County tax burden in any way. For example, the City of Paducah pays not one cent toward operation of the McCracken County jail where Paducah prisoners are incarcerated. That expense is borne by the county at large. Rather, the city tax dollars are spent for services in addition to, and not for services instead of, those provided by McCracken County. The appellees' credit cannot withstand equal protection standards when it is given for payments wholly unrelated to the tax it is credited against.

A dangerous precedent will be set if this honorable Court does not step in to stop the injustice. In the immediate sense,

part of a county will be forced to carry an entire tax load even though the whole county benefits. But in the days ahead,who knows how far the consequences will run? To follow the logic of this case, Congress could enact a credit (instead of the present deduction) against the federal income tax for income taxes paid to a state. The obvious result would be that the citizens of states without an income tax would bear a much larger share of the nation's tax burden than citizens of states with such a tax. The taxing states would keep their money at home to help themselves. Naturally, all states would then have an incentive to enact a high income tax rate, since they could receive more money by doing so without causing their citizens to pay any more tax overall.

Unless this Court acts, the same thing will happen on a smaller scale within Kentucky as one municipality after another enacts an occupational tax to offset a similar tax of the county in which it lies. But on this scale there is a major difference. Unlike the nation as a whole, not all parts of Kentucky will be able to avail themselves of the tax credit by enacting a tax of their own. That is to say, every part of the United States is also part of a state and, in the example above, would have the means to institute a tax and thus take the credit, thereby retaining locally money which otherwise would go to the central government. In Kentucky, not every part of a county is also part of a city. The non-city residents are left without recourse, and must pay all of a tax which city residents, although equally benefited, do not have to pay.

Such a situation is especially repugnant when the voting population of the city is much larger than the voting population outside the city, and the non-paying majority can run roughshod over the paying minority at the polls. The principle is no different than if customers of an independent water district, constituting a majority of the county, voted a credit against the county occupational tax for water bill payments. The minority of customers residing outside the water district, who obtain

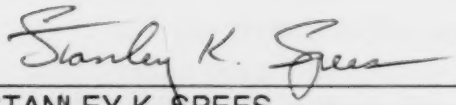
water at their own expense, would be left to bear the county tax burden alone, even though the majority's water payments would bear no relation whatsoever to the supplying of county services. The case would simply be that of the majority "bully" forcing the minority to make tax payments which benefit both majority and minority. That situation, like the instant case, is not one of "taxation without representation," but rather "representation without taxation."

When other counties in Kentucky enact similar tax credits, as they surely will, the cost to the paying minority will be enormous. Millions of dollars are at stake in McCracken County alone. During the first five quarters in which the tax was in effect it generated $2.2 million. Of course the money came almost entirely from persons working outside Paducah, while most of those working inside the city paid nothing. Millions upon millions of dollars will be added to that figure over the years if this Court does not tell the appellees that they must adhere to the Fourteenth Amendment.

It is not possible, and counsel is aware this Court does not desire, that the issues of this case be fully argued in this jurisdictional statement. But enough information has been included here to demonstrate that the appellants have not received equal protection of the laws from their local and state law-making bodies. Thank goodness for the Fourteenth Amendment, which insures that they will now receive that equal protection despite its denial in the two state courts which have considered the issue! In a constitutional sense, the question is substantial. As Justice Vance said in the quote above, the possibilities for special treatment are endless if such a statute is permitted to stand. The very purpose of the Fourteenth Amendment is to prevent such favoritism. But the sacred words of that Amendment will have no meaning to the appellants in the case at bar unless they are allowed to proceed in this Court. All other hope has been exhausted. The appellants pray that this Court will grant plenary consideration, with

briefs on the merits and oral argument, in order that they might develop the issue to the extent it serves.

Respectfully submitted,



STANLEY K. SPEES
325 North 4th Street
P.O. Box 2806
Paducah, Kentucky 42002
(502) 443-8263
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

Pursuant to Rule 28.3, 28.4(c) and Rule 28.5(b) of the United States Supreme Court Rules, I, Stanley K. Spees, a member of the Bar of the United States Supreme Court, hereby certify that the foregoing Jurisdictional Statement has been served upon all parties required to be served in the following manner:

(a) Upon the appellees, McCracken County, Kentucky; John Harris; Fred Austin; Wayne Lindsey; and Danny Orazine, by depositing three (3) copies in a United States mailbox, with first-class postage prepaid, addressed to their counsel of record, Fred H. Grimes, Esquire, McCracken County Courthouse, Paducah, Kentucky 42001, Attorney for Appellees; and

(b) Upon the Commonwealth of Kentucky by depositing three (3) copies in a United States mailbox, with first-class postage prepaid, addressed to the Attorney General of Kentucky, Hon. Fredric J. Cowan, Jr., 120 State Capitol, Frankfort, Kentucky 40601;

all on this the 23RD day of September, 1988.

Stanley K Spees

STANLEY K. SPEES

APPENDIX

RENDERED: June 30, 1988
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
No. 87-SC-797-TG

JIM SHOULDERS; HAROLD HAMMONS;
BEVERLY JACKSON; TROY BEAN;
JEROME CASSELL; STEVE COURTNEY;
WAYNE TRAVIS; and BUD WALTMON APPELLANTS

ON APPEAL FROM McCRACKEN CIRCUIT COURT
V. HONORABLE JAMES R. DANIELS, JUDGE
No. 87-CI-268

McCRACKEN COUNTY, KENTUCKY;
JOHN HARRIS; FRED AUSTIN;
WAYNE LINDSEY; and DANNY
ORAZINE APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On October 23, 1986, the McCracken County Fiscal Court enacted a one per cent (1%) occupational and business license tax to become effective January 1, 1987. The tax was levied pursuant to KRS 68.197 on the gross wages of employed persons and on the net profits of all firms and self-employed persons within McCracken County.

As provided in KRS 68.197(4), those individuals and firms which paid a similar occupation tax to the City of Paducah (the sole municipality within the county with such a tax) were given a credit against the tax to the extent of the tax paid to the city.

Paducah has a city occupational tax of one and one-half per cent (11/2 %) levied against employees earning income within the city. Self-employed persons and firms within the city pay a graduated tax on gross receipts, which tax varies according to the occupation or trade engaged in. There is also a cap or maximum on the gross receipts of the self-employed person, the result of which will occasion additional taxes to these persons under the county license tax.

Appellants herein instituted this action, alleging that the credits allowed by the McCracken County Occupational Tax under KRS 68.197 (3) (4) are in fact an exemption and thus unconstitutional under Sections 170, 171, 174, 59, 60, 1 and 2 of the Kentucky Constitution and that workers outside the city limits of the City of Paducah are being denied equal protection under the Fourteenth Amendment to the United States Constitution.

Appellants first argue that the summary judgment of the lower court be reversed on the ground that the trial judge overruled appellants' motion to disqualify himself from the case because he attended a public hearing on the need for a new jail in McCracken County, one of the avowed purposes of the occupational tax. It is uncontradicted that the trial judge made no comment of any kind, gave no opinion on any matter, nor did he respond to any question. This motion was not based upon any allegation of actual bias or prejudice, but upon the fact that his appearance might cause his impartiality to be reasonably questioned. *See* Canon 4 (B) of the Code of Judicial Conduct. This court finds no grounds alleged in this argument which would justify reversal of the judgment of the lower court.

Appellants' final argument concerns the constitutionality of KRS 68.197 (3) (4). We have upheld the use of tax credit in a similar situation in *Kupper v. Fiscal Court of Jefferson County*, Ky., 346 S.W. 2d 766 (1961). Although the statute in *Kupper* was different, it was determined constitutional on

grounds which are apropos to the present case. The court, at page 770, stated:

> Here the tax is applied uniformly throughout the entire county. No property is exempt from taxation. No person is exempt from the duties imposed by the tax. Allowance of credit is authorized for those persons who have become liable for a tax against a tax liability for the same privilege and for the same period this Act encompasses. The taxpayer is not excused from liability of a county tax in any way but he is relieved of payment thereof in the amount he has paid a city for a like tax for that period. Every taxpayer, regardless of where he works, is taxed for the same privilege. the credit device assures that payment for that privilege shall be equal among all taxpayers.

We would add that failure to provide the credit would result in great disparity between employees who live in the same county, with the city employee paying two and one-half times that of the non-urban worker.

The *Kupper* court went on to say:

> We . . . . . take notice that both the county and cities therein have problems which are mutual and cannot be distinguished. *** The rapid growth of population, as well as the increased demand for social and economic improvement, have caused the burden of government to become more complex with each passing year. As the burden increases, the need for revenue increases proportionately. No longer can one area isolate itself and conquer its problems alone. There must be a cooperative sharing of services and expendi-

> tures by the various units if the requisite services are to be performed. A political unit which performs services contributing to the general burden benefits not only itself but also any other unit which is required to perform the same services. In like manner, a taxpayer who contributes to one unit for the performance of such service is in effect contributing to the whole and should not be required to duplicate his burden.

The Legislature recognized, and this court recognizes, that, in those counties containing a city of 30,000 or more, as much as 60% of the general fund of the county comes from the urban resident from real and personal property taxes collected by the county on property within the city limits. Therefore, in joint projects between the city and county governments (such as public libraries, welfare projects, etc.), the city taxpayer is providing 100% of the city's contribution and 60% of that of the county. It is our opinion that KRS 68.197 (3) (4) is but a well reasoned effort at equality.

The McCracken Circuit Court is affirmed.

All concur except Vance, J., who dissents and files a separate dissenting opinion.

ATTORNEY FOR APPELLANTS:

Stanley K. Spees
325 North 4th Street
P.O. Box 2806
Paducah, KY 42002

ATTORNEY FOR APPELLEES:

Fred H. Grimes
McCracken County Courthouse
Paducah, KY 42001

RENDERED: June 30, 1988
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
No. 87-SC-797-TG

JIM SHOULDERS; HAROLD HAMMONS;
BEVERLY JACKSON; TROY BEAN;
JEROME CASSELL; STEVE COURTNEY;
WAYNE TRAVIS; and BUD WALTMON APPELLANTS

ON APPEAL FROM McCRACKEN CIRCUIT COURT
V. HONORABLE RON DANIELS, JUDGE
No. 87-CI-268

McCRACKEN COUNTY, KENTUCKY;
JOHN HARRIS; FRED AUSTIN;
WAYNE LINDSEY; and DANNY
ORAZINE APPELLEES

DISSENTING OPINION BY JUSTICE VANCE

Vance, J., dissenting. Because I believe that uniformity in the application of laws to the citizens of this Commonwealth is the most basic principle established by our constitution, I cannot agree with the majority. Kentucky Constitution § 171 requires that taxes shall be levied and collected for public purposes only, and shall be *uniform* upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax.

The logic of the majority is that the McCracken County occupational tax is uniform throughout the county because it is levied against all citizens who work in the county, including those whose place of employment is in the city. This is said to

be uniform even though those citizens whose place of employment is in the city will never have to pay the county occupational tax because they are allowed a credit against the county tax by the amount they pay to the city for the city occupational tax. This, says the majority, equalizes the tax burden between city and county residents and prevents double taxation.

There is a beguiling plausibility to the majority opinion which tends to conceal its true effect. The truth is that cities and counties are separate governmental entities, each having the power to levy taxes to defray its cost of operation. A county is a subdivision of state government. Every citizen of the county is subject to taxation to defray the expenses of county government.

Cities are municipal corporations which exist as a separate entity of government within a county. A city is an entirely separate unit of government which is organized solely for the benefit of those citizens within its boundaries, and the cost of city government must be borne by those who organized it and who benefit from it. They must pay the costs of their city government in addition to the taxes which they must pay to defray the cost of their county government.

A city occupational tax is levied by a city for the purpose of paying the costs of the operation of city government. It is levied upon all who earn wages in the city. A county occupational tax is levied by the county for the purpose of paying the costs of operation of county government. it is levied upon all persons who are employed within the territorial jurisdiction of the county. Although a county occupational tax is levied upon those who work in the city as well as those who are employed in the county, it is levied by a different governmental entity and for an entirely different governmental purpose, i.e., support of county government rather than city government.

For this reason a county occupational tax does not consti-

tute double taxation when applied to a worker who is subject to a city occupational tax; likewise, for the same reason, a county occupational tax is not uniform when only a portion of the wage earners in the county are required to pay it and many others are relieved from its payment.

The contention that relief from payment is only a credit but not an exemption from the tax is untenable. A credit may be allowed where the tax has been satisfied by a payment in some other form, but the payment to the city of an occupational tax to defray the cost of city government can never be said to constitute a satisfaction of one's obligation to defray the cost of county government. If so, the payment of city real estate taxes could be offset against the payment of county real estate taxes.

Even though the statute which authorized the tax credit involved here may have been well intentioned and the tax may have been levied for a necessary purpose, it should be invalidated. Once the legislature is allowed to encroach against the fundamental principle of uniformity in the application of laws to the citizens of this Commonwealth, there is no end to the possibilities of special treatment rather than uniformity under the law.

McCRACKEN CIRCUIT COURT
DIVISION NO. II
CIVIL ACTION NO. 87-CI-268

JIM SHOULDERS; HAROLD HAMMONS;
BEVERLY JACKSON; TROY BEAN;
JEROME CASSELL; STEVE COURTNEY;
WAYNE TRAVIS; and BUD WALTMON PLAINTIFFS

VS.

McCRACKEN COUNTY, KENTUCKY;
JOHN HARRIS; FRED AUSTIN;
WAYNE LINDSEY; and DANNY
ORAZINE; and COMMONWEALTH
OF KENTUCKY DEFENDANTS

CONCLUSIONS OF LAW

The plaintiffs, Jim Shoulders et al, filed a Complaint, Petition for Declaratory Judgment and Petition for Permanent Injunction in which they seek to invalidate KRS 68.197, as amended, and the subsequent enactment of an ordinance by the McCracken County Fiscal Court, pursuant to authority vested in said County legislative body by the provisions of KRS 68.197.

This act provides that a fiscal court of a county having a population of thirty thousand (30,000) or more, may by order or resolution, impose license fees on franchises, provide for licensing any business, trade, occupation or profession, etc. Said license fee or tax may be imposed at a percentage rate not to exceed one per cent (1%) of:

(a) Salaries, wages, commissions, and other compensa-

tion, earned by persons within the County for work done and services performed or rendered in the County.

(b) The net profits of self-employed individuals, partnerships, professional associations, or joint ventures resulting from trades, professions, occupations, businesses or activities conducted in the County; and

(c) The net profits of corporations resulting from trades, professions, occupations, businesses or activities conducted in the County.

That section of this statute which is specifically at issue in this suit is subsection (4) which reads as follows:

"The provisions of subsection (3) of this section notwithstanding, effective with license fees imposed under the provision of subsection (1) of this section on or after July 15,1986, persons who pay a county license fee and a license fee in the city contained in the county shall be allowed to credit their city license fee against their county license fee."

The City of Paducah, situated within the boundaries of McCracken County has had, for may [*sic*] years, an occupational license fee or tax which is one and one-half (1 1/2%) per cent of the gross earnings of workers earned within the confines of the City of Paducah and a graduated license fee on all self-employed persons, partnerships, professional associations, or joint ventures resulting from trades, professions, occupations, businesses, or activities conducted in the city.

The McCracken County Fiscal Court enacted its ordinance on October 23, 1986, providing for the levy and collection of an occupational tax or license fee of one (1%) per cent of gross earnings of individuals and one (1%) per cent of the net earnings of self-employed individuals, partnerships, corporations, etc., pursuant to and in compliance with KRS 68.197, as

amended.

Plaintiffs have attacked the constitutionality of KRS 68.197, as amended, and have, with particularity, directed their arguments against subsection (4) which provides for a credit against the county tax for like taxes paid to a city within a county for the same period. They allege that Seciton 171 of the Kentucky Constitution mandates that taxes be uniform within the territorial limits of a particular taxing authority; they further allege that Sections 170 and 174 of the Kentucky Constitution prohibit exemptions from taxation except as specified therein; that Sections 59 and 60 of the Kentucky Constitution prohibit the enactment of special acts which result in unequal applications of rights, privileges or responsibilities; that Sections 1 and 2 of the Kentucky Constitution prohibit unequal or arbitrary treatment of persons within the jurisdiction of the Commonwealth of Kentucky; that the Fourteenth Amendment to the U.S. Constitution prohibits every state in the Union from denying to any person within its jurisdiction the equal protection of the laws.

This Court discounts, without merit, the plaintiffs'allegations that KRS 68.197 as amended, violates Sec. 170 and 174 of the Kentucky Constitution. Kentucky's highest appellate court, in *Kupper* vs *Fiscal Court of Jefferson County*, 346 SW2d 766 (1961), upheld the use of a tax credit for workers in Louisville, Kentucky, to the extent or [*sic*] occupational tax or fees paid to the City of Louisville against a like tax, for the same period, levied by Jefferson County.

In this case the Court distinguished a tax credit from an exemption from taxes by saying, "an exemption completely absolves a potential taxpayer from any liability for, or responsibility concerning the tax whatsoever - on the other hand, a tax credit relieves the taxpayer from direct payment of all or a portion of the particular tax on the theory that it has been satisfied by some other method."

In addition, the plaintiffs' herein would have this Court distinguish *Kupper*, Supra, by reasoning that the City of Louisville was making voluntary payments to the County of Jefferson to offset the cost of services provided by the county, whereas no such contribution is forthcoming from the City of Paducah. Although the dissent in *Kupper* raised this point, it was not a consideration on the part of the majority. Consequently,the lack of subsidy from the City of Paducah is not dispositive of the issue in the case at hand.

This Court has considered the plaintiff's efforts to invalidate KRS 68.197, as amended, as being in violation of the uniformity requirement for the levying and collection of taxes in Sec.171 of the Kentucky Constitution.

In 1939, in the case of *Great Atlantic and Pacific Tea Company* vs. *Kentucky Tax Commission*, 278 Ky. 367, 128 S.W.2d 581, the Court explained its position to distinguish property taxes as referred to in Section 171 of the Kentucky Constitution from the imposition of license and occupational taxes by saying:

"While the provisions of Section 171 of our constitution requiring taxes to be equal and uniform, may apply in their fullness only to direct taxation of property, yet the principles of equality and uniformity must be observed in imposing license and occupation taxes. The uniformity provision does not prevent the classification of businesses, trades, professions, or occupations, and the taxation of different classes at different rates, but the tax must be uniform on all subjects within the class to which it is applied, and the classification must be made according to natural and well recognized lines of distinction. . . "

This Court takes note of the opinion of the Kentucky highest appellate court in the *City of Louisville* vs *Sebree, 308 Ky. 420*, 214 S.W.2d 248 (1949), in which that court held that

an occupational tax is not a property tax. Even though the Court has consistently applied the uniformity requirement of Section 171 to non-property taxes or fees, it apparently recognizes a distinction, particularly in that rather special area of overlapping or coterminous taxing jurisdictions. While maintaining that non-property taxes (such as the occupational license fee or tax in issue) must be uniform within a class, taxing authorities should be allowed wide discretion in the classification of objects for taxation.

In *Delta Airlines, Inc.* vs *Com-Rev. Cab*, 680 S.W.2d 14 (1985), the Kentucky Supreme court reaffirmed the Court's position in many prior cases by saying, "a classification by a taxing authority for purpose of imposing a non-property tax should be upheld unless it is positively shown that the classification is so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis." See also, *Madden* vs *Commonwealth*, 309 U.S. 83 (1939) affirming 277 Ky. 343, 126 S.W.2d 463 (1939).

In the landmark case of *Kupper* vs. *Fiscal Court of Jefferson County*, supra, a similar tax credit granted Louisville workers was upheld as not being in violation of Sec. 171 of the Kentucky Constitution and the Court reasoned that the uniformity requirement of Sec. 171 was not violated, and that the classification of workers taxed by the authority of KRS 68.190 (similar to KRS 68.197) was not in violation of Sec. 171 of the Kentucky Constitution with respect to the classification of persons taxed.

In the *Kupper* Case, the Court held that "the tax is applied uniformly throughout the entire county. No property is exempt from taxation. No person is exempt from the duties imposed by the tax. Allowance of credit is authorized for those persons who have become liable for a tax against a tax liability for the same privilege and for the same period this Act encompasses. The taxpayer is not excused from liability of a county tax in any way,

but he is relieved of payment thereof in the amount he has paid a city for a like tax for that period. Every taxpayer, regardless of where he works, it taxed for the same privilege. The credit device assures that payment for that privilege shall be equal among all taxpayers."

This Court takes note of the fact that City of Paducah workers will still be paying a greater tax on their income than those who work in McCracken County.

The Court discounts the plaintiffs' arguments that KRS 68.197, as amended, constitutes special legislation which violate Sections 59 and 60 of the Kentucky Constitution, or that said statute violates Sections 1 and 2 of the Kentucky Constitution.

The fact that there are "distinctive and natural reasons " supporting the classification in the McCracken County Ordinance render it non-violative of the prohibition against "special legislation."Singling out the City of Paducah for preference while not so including the City of Lone Oak for example merely reflects the facts as they exist. Lone Oak city residents pay no occupational tax to their City and therefore receive no credit. Future actions on the part of the governing body of Lone Oak may necessiate responsive moves by McCracken county.

Likewise, the fact that counties who elect to raise revenue under KRS 68.197 (4) are held to different standards that those who have previously so elected is not constitutionally fatal. A change in the way government addresses issues is not, per se, unconstitutional.

There appears to be no prohibition against a particular county availing itself of the advantages of KRS 68.197 (4) even though their particular ordinance pre-date the effective date of this subsection.

For the same reasoning applied by the Court in *Kupper* vs *Fiscal Court of Jefferson County*, supra, this Court finds that KRS 68.197 is not in violation of the prohibitions set forth in the Fourteenth Amendment to the U.S. Constitution and observes the various [*sic*] in the Federal Court as well as sister states that are cited in the *Kupper* case.

By like reasoning the allegation of Plaintiffs that Section (3) of KRS 68.197 should be declared unconstitutional is totally without merit.

In summary, the Court finds that KRS 68.197 and the McCracken County occupational license fee/tax enacted pursuant thereto are not in violation of any guaranties under the Kentucky or United States Constitutions.

ORDER AND JUDGEMENT

Now therefore, having considered the memoranda filed by counsel and having heard their arguments in support of their respective motions for summary judgment, the Court does hereby find for the defendants on their Motion for Summary Judgment; that the Plaintiffs' Motion for Summary Judgment be, and is hereby, overruled, and further, that the Complaint, Petition for Declaratory Judgment and Petition for Permanent Injunction of the plaintiffs be and is hereby dismissed at plaintiffs' costs.

ENTERED this the 14th day of September, 1987.

/s/ Ron Daniels
RON DANIELS, JUDGE
McCRACKEN CIRCUIT COURT
DIVISION NO. II

CLERK'S CERTIFICATE

It is certified that copies of the foregoing Order were mailed to:

Hon. Stanley K. Spees, P.O. Box 2806, Paducah, KY 42002

Hon. Fred H. Grimes, P.O. Box 2244, Paducah, KY 42001

on this 14th day of Septmeber, 1987.

/s/ Alfred Obermark, Clerk
by G. Ransom, D.C.

ALFRED OBERMARK, CLERK
McCRACKEN CIRCUIT COURT

SUPREME COURT OF KENTUCKY
CASE NO. 87-SC-797-TG

JIM SHOULDERS; HAROLD HAMMONS; BEVERLY JACKSON; TROY BEAN; JEROME CASSELL; STEVE COURTNEY; WAYNE TRAVIS; and BUD WALTMON;

APPELLANTS

VS.

NOTICE OF APPEAL

MCCRACKEN COUNTY, KENTUCKY; JOHN HARRIS; FRED AUSTIN; WAYNE LINDSEY; and DANNY ORAZINE;

APPELLEES

For their notice of appeal to the United States Supreme Court, the appellants state:

1. That the parties taking the appeal are Jim Shoulders, Harold Hammons, Beverly Jackson, Troy Bean, Jerome Cassell, Steve Courtney, Wayne Travis and Bud Waltmon.

2. That they appeal to the United States Supreme Court from the judgment, denominated "Memorandum Opinion of the Court," rendered by the Supreme Court of Kentucky on June 30, 1988, in the above-styled action.

3. That this appeal to the United States Supreme Court is taken under authority of 28 U.S.C. § 1257(2).

/s/ Stanley K. Spees

STANLEY K. SPEES
325 North 4th Street,
P. O. Box 2806
Paducah, Kentucky 42002
(502) 443-8263
ATTORNEY FOR APPELLANTS

ENTRY OF APPEARANCE

I, Stanley K. Spees, hereby enter my appearance as counsel of record for the appellants, Jim Shoulders, Harold Hammons, Beverly Jackson, Troy Bean, Jerome Cassell, Steve Courtney, Wayne Travis and Bud Waltmon.

/s/ Stanley K. Spees
STANLEY K. SPEES

CERTIFICATE OF SERVICE

Pursuant to Rule 10.2, Rule 28.3 and Rule 28.5(b) of the United States Supreme Court Rules, I, Stanley K. Spees, a member of the Bar of the United States Supreme Court, hereby certify that the foregoing Notice of Appeal has been served on the appellees, McCracken County, Kentucky; John Harris; Fred Austin; Wayne Lindsey; and Danny Orazine, being all parties required to be served, by depositing in a United States mailbox, with first-class postage prepaid, addressed to their counsel of record, Fred H. Grimes, Esquire, McCracken County Courthouse, Paducah, Kentucky 42001, Attorney for Appellees, and that a copy has been mailed for filing to the court possessed of the record by depositing in a United States mailbox, with first-class postage prepaid, addressed to the McCracken Circuit Court Clerk, Courthouse, Paducah, Kentucky 42001, all on this the 29th day of August, 1988.

/s/ Stanley K. Spees
STANLEY K. SPEES

MCCRACKEN CIRCUIT COURT
DIVISION NO. II
Civil Action No. 87-CI-268

JIM SHOULDERS, et al. PLAINTIFFS

v.

NOTICE OF ATTORNEY GENERAL OF INTENT NOT TO INTERVENE OR MOTION TO DISMISS

MCCRACKEN COUNTY, et al. DEFENDANTS

Comes the Commonwealth of Kentucky, by Attorney General David L. Armstrong, and states as follows.

The Commonwealth of Kentucky was named as a party defendant in this action. According to the Complaint, paragraph 4, this was done pursuant to KRS 418.075, since a portion of a statute is alleged to be unconstitutional.

> KRS 418.075 states, in part:
> "In any proceeding which involves the validity of a statute, the attorney general of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard . . ."

As the court stated in *Revis v. Daugherty*, 215 Ky. 823, 287 S.W. 28 (1926), the Attorney General is not required to be made a party to the proceeding. It is only required that he be given notice and a copy of the petition. Such has been done here. The Attorney General gives notice of his intent not to intervene in this matter.

In the alternative, if the court believes that the fact that the Attorney General was made a party, regardless of KRS

418.075, requires that he remain a party, he hereby moves to be dismissed from this lawsuit.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

/s/Nathan Goldman

NATHAN GOLDMAN
ASSISTANT ATTORNEY GENERAL
120 STATE CAPITOL
FRANKFORT, KENTUCKY 40601-3494
502/564-7600
COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Notice was mailed first class, postage prepaid to Stanley K. Spees, 325 North 4th Street, P. O. Box 2806, Paducah, Kentucky 42002 and Fred Grimes, McCracken County Attorney, Courthouse, Paducah, Kentucky 42001 this 28th day of April, 1987.

/s/ Nathan Goldman
Assistant Attorney General

68.197. License fees on franchises, businesses, occupations or professions in counties of 30,000 or more–Credit of city license fee against county license fee.–(1) The fiscal court of each county having a population of thirty thousand (30,000) or more, may by order or resolution impose license fees on franchises, provide for licensing any business, trade, occupation or profession, and the using, holding or exhibiting of any animal, article or other thing. License fees on such business, trade, occupation, or profession for revenue purposes, except those of the common schools, may be imposed at a percentage rate not to exceed one percent (1%) of:

(a) Salaries, wages, commissions and other compensation earned by persons within the county for work done and services performed or rendered in the county;

(b) The net profits of self-employed individuals, partnerships, professional associations, or joint ventures resulting from trades, professions, occupations, businesses or activities conducted in the county; and

(c) The net profits of corporations resulting from trades, professions, occupations, businesses or activities conducted in the county.

In order to reduce administrative costs and minimize paperwork for employers, employees and businesses, the fiscal court may provide:

(a) For an annual fixed amount license fee which a person may elect to pay in lieu of reporting and paying the percentage rate as provided in this subsection on salaries, wages, commissions and other compensation earned within the county for work done and services performed or rendered in the county; and

(b) For an annual fixed amount license fee which an individual, partnership, professional association, joint venture or corporation may elect to pay in lieu of reporting and paying the percentage rate as provided in this subsection on net profits of businesses, trades, professions or occupations from activities conducted in the county.

Licenses imposed for regulatory purposes are not subject to such limitations as to form and amount. No public service company that pays an ad valorem tax is required to pay a license tax, and no license tax shall be imposed upon or collected from any insurance company, bank, trust company, combined bank and trust company, combined trust, banking and title business in this state, or any savings and loan association whether state or federally chartered, or in other cases where the county is prohibited by law from imposing a license tax.

(2) No such license fee shall be imposed or collected on income received by members of the Kentucky national guard for active duty training, unit training assemblies and annual field training.

(3) Persons who pay a county license fee pursuant to this section and who also pay a license fee to a city contained in the county may upon agreement between the county and the city, credit their city license fee against their county license fee.

(4) The provisions of subsection (3) of this section notwithstanding, effective with license fees imposed under the provisions of subsection (1) of this section on or after July 15, 1986, persons who pay a county license fee and a license fee to a city contained in the county shall be allowed to credit their city license fee against their county license fee. (Enact. Acts 1966, ch. 263, § § 1,2; 1968, ch. 152, § 40; 1974, ch. 113, § 1; 1976, ch. 301,§ 3; 1978, ch. 268, § 1, effective June 17, 1978; 1986, ch. 131, § 1, effective July 15, 1986.)

McCRACKEN COUNTY ORDINANCE NO. 86

AN ORDER RELATING TO LICENSE FEES UPON ALL PERSONS WHO ARE ENGAGED OR EMPLOYED IN ANY TRADE, OCCUPATION OR PROFESSION WITHIN THE COUNTY OF McCRACKEN, FOR THE HEALTH, EDUCATION, SAFETY, WELFARE AND CONVENIENCE OF THE INHABITANTS OF McCRACKEN COUNTY,

BE IT ORDERED AS FOLLOWS:

SECTION I.

DEFINITIONS: WORDS AND PHRASES USED IN THIS ORDER SHALL HAVE THE ORDINARY AND ACCEPTED MEANING ASCRIBED TO THEM AND THE SPECIAL MEANINGS ASCRIBED TO THEM BELOW:

(a) The phrase "license fee" shall mean a tax for the privilege of exercising the right to engage in trade, occupation or profession for compensation paid by others or the right to engage in trade, occupation or profession, for oneself, for profit or gain, within McCracken County, Kentucky.

(b) The word "person" shall mean and include all natural persons, partnerships, firms, associations, governmental bodies and agencies, and corporations, and whenever used in any interpretation.

(c) "Administrator" means an official administrator of the occupational tax, to be appointed by the McCracken County Fiscal Court.

SECTION II.

EFFECTIVE DATES AND DURATION:

This order shall apply and be effective from and after

January 1, 1987, and shall remain in full force and effect until repealed or modified in a lawful manner.

SECTION III.

LICENSE FEES REQUIRED:

(a) All persons engaged in any trade, occupation or profession, within McCracken County, when employed by another, shall pay a license fee measured by and equal to one percent (1%) of gross receipts paid for such service.

(b) All persons engaged in any trade, occupation, or profession, within McCracken County, for themselves, for profit or gain, shall pay a license fee measured by and equal to one per cent (1%) of the net profit realized from such activity. "Net Profit" as used herein shall mean gross receipts less ordinary business deductions, recognized as such, and allowed by the laws of the Commonwealth of Kentucky, in computing ncome tax liability, but without deductions for taxes based on income. It shall be unlawful for any person to engage in any trade, occupation or profession within McCracken County without withholding, reporting and paying the license fees herein provided and required. Portions of this order prescribing a penalty in the form of fine or imprisonment, shall mean and include the individual members of a firm, partnership or association and the officers of any governmental body or agency, or any corporation.

(c) The words and phrases "trade, occupation or profes sion" shall include any and all activities and the rendering of any and all services of all kinds or other renumeration, or net profit or gain of any kind when applied to persons so engaged for themselves

whether the person be a resident of McCracken County or not.

(d) The word "County" means McCracken County, Kentucky, and includes the cities of Paducah and Lone Oak.

(e) All persons engaged in any trade, occupation or profession, when employed by another, and all per sons engaged in any trade, occupation or profession, for themselves, within the territorial boundaries of the City of Paducah, and paying a license fee to the City of Paducah for the privilege of working or engaging in a business or profession within the City of Paducah, shall be entitled to credit for such fees paid to the City of Paducah against the fees imposed by McCracken County, Kentucky.

(f) The phrase "gross receipts" and the word "compensation" when applied to a person employed by others shall have the same meaning and shall include the gross amount of all salaries, wages, commissions, bonuses or other money payments of any kind, or other considerations having a monetary value, which a person receives or becomes entitled to, or is given credit for by an employer, without deduction for withholding taxes, social security benefits, any form of insurance or retirement benefits,or other deductions made by an employer in calculating "take home-pay" provided however that any traveling expenses actually incurred and paid by the employer, gratuities such as "tips" paid by someone other than the employer, and wages, salaries or other compensation received by domestic servants employed in a private home, shall be exempt from the operation of this order.

(g) The singular shall include the plural, the plural shall include the singular, the masculine or feminine shall include both and the neuter genders whenever susceptible to such.

SECTION IV.

REGULATION, ADMINISTRATION, ENFORCEMENT AND COLLECTION OF LICENSE FEES AND THE PURPOSE THEREOF:

It shall be the duty of the Administrator to collect all license fees and deposit the same in the General Fund of McCracken County, to be used to defray the general expenses of the County Government. The Administrator shall have the power, and it shall be his duty to make and publish such rules and regulations as may be necessary to administer this order and to provide such printed forms as may be required for reporting, paying and receipting all such license fees and for all other requirements in the proper and efficient administration of this order.

SECTION V.

DUTY OF EMPLOYER TO WITHHOLD, REPORT AND PAY LICENSE FEES OF EMPLOYEES:

(a) It shall be the duty of every person engaged in any trade, occupation or profession, within McCracken County who employes or engages the services of others in connection therewith, to withhold from the compensation of such employee, the license fees herein provided, at the time such compensation is paid or credited; said shall report and pay the same to the Administrator on or before April 30, July 31, October 31 and January 31, of each year, for the license fees accrued during the preceding three months beginning July 1, 1987, except as provided

(b) and (c). Failure on the part of the employer to withhold, report and pay the license fees shall not relieve the employees from liability therefor.

(b) A person engaged in agriculture business (raising crops and livestock) who employ less than five (5) employees on a regular time basis, (four-hundred fifty (450) hours during a quarter), may file a return and pay the withholding tax at the end of the taxable year.

(c) Any person may elect to estimate and pay in advance, the witholding tax that may become due from compensation to be paid employees for a taxable year.

This procedure will exempt the person from filing quarterly returns. The penalty for underpayment will be as provided in sub-section (d) below.

(d) All license fees not paid when due shall draw interest at the rate of twelve per cent (12%) per annum from due date until paid, and upon failure to pay any license fee when due, a penalty of ten percent (10%) is hereby imposed which penalty shall draw interest from due date.

SECTION VI.

DUTY OF PERSON ENGAGED IN TRADE, OCCUPATION OR PROFESSION FOR ONESELF TO REPORT AND PAY LICENSE FEES:

It shall be the duty of every person engaged in any trade, occupation or profession for themselves, for gain or profit, within the County, to file with the Administrator a return

showing the net profit or gain from such activity realized during the preceding year as determined by the Licensee's method of accounting or keeping books, and shall pay the license herein provided, calculated on the net profit for such preceding fiscal year. Within 105 days after the end of the Licensee's fiscal year following January 1, 1987, such person shall file a report with the Administrator showing the net profit or gain for the preceding license period.

The first license period shall extend from January 1, 1987, until the end of the licensee's fiscal year, and the license fee for that period shall be calculated on a pro-rated basis as of the end of the Licensee's fiscal year. The Licensee shall be permitted to adopt any fiscal period which corresponds with his system of accounting or bookkeeping, or the period adopted for income tax purposes.

SECTION VII.

DUTY OF EMPLOYEE WHEN EMPLOYER FAILS TO WITHHOLD, REPORT OR PAY:

In the event an employer fails to withhold, report or pay license fees for which any employee is liable, then it shall be the duty of the employee to report and pay the same when due and to file reports showing total gross receipts for the period from January 1, 1986, to December 31, 1986, and thereafter annually. Said reports shall be made upon forms furnished by the Administrator and shall be filed not later than April 15th of each year. In the event the Licensee has not paid the full amount of license fees due for any period, the deficit, together with interest and penalties, must be paid when the reports above provided for are filed or the amount legally determined by the Administrator. In the event of overpayment, McCracken County shall make prompt refund.

SECTION VIII.

APPORTIONMENT OF LICENSE FEES WHERE COMPENSATION OR NET PROFIT IS DERIVED FROM ACTIVITY BOTH WITHIN AND WITHOUT THE COUNTY:

Whenever any employee receives compensation for services or activity performed both within and without the County, the license fee required under this order shall be computed and paid upon the basis of the proportion of compensation earned for services performed within the County.

Whenever the net profit or gain from any trade, occupation or profession is derived from activity or business done within and without the County, the license fee required under this order shall be computed and paid upon the proportion of net profit or gain derived from activity within the County.

In all cases of license fees computed upon the basis of apportionment of compensation or net profit or gain, as herein provided, the apportionment may be shown by the sworn statements of the licensee or employer, but shall not be binding upon the County. Said apportionment shall be subject to verification and determination by the Administrator or his agents or employees through examination and audit of the books and records of the licensee or employer, or both, as required by the Administrator.

SECTION IX.

RECORDS REQUIRED:

The reports required by this order shall be in form prescribed by the Administrator and shall contain all essential information, date and figures, upon which the license fees required by this order are computed. Every person required to pay any license fee provided by this order shall be required to

make all books, records and accounts upon which information required by this order is based, available to the Administrator, his agents or employees, for the purpose of examination, audit or verification; provided however, that if any licensee or employer, subject to the provisions of this order, shall voluntarily submit copies of income tax returns for examination, then in such case no further examination or audit will be required until and unless there is re-examination or audit made by the taxing authority to whom the return was made; and provided further, the Administrator may dispense with examination of the books, records, accounts, or tax returns of the licensee in any case where the Administrator is furnished with a certificate of any attorney at law, a licensed public accountant, or the sworn statement of any other accountant or bookkeeper of the licensee stating that the amount of tax reported conforms to the income tax return filed by the licensee for the applicable period.

Nothing herein shall prevent or preclude the Administrator from conducting an examination and audit of the books, records, and accounts, as herein provided at any time he may have reasonable grounds to believe that the Licensee has not correctly reported and paid the license fees due under the provisions of this order.

All information obtained by the Administrator or any of his agents or employees, or any other official or employee of McCracken County, from any reports, examination or audit of books, records, accounts, income tax returns, or any other source, in the administration of this order, shall be treated and considered as confidential and privileged except for official purposes, unless otherwise treated by judicial decree or specific provision of law, and shall not be open to inspection by the public.

Any official, agent or employee of McCracken County who divulges any information obtained under the provision of this order, except for the purposes of administering this order

as herein provided, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than $100.00, not more than $500.00, or punished by confinement for not more than thirty (30) days, or both.

It is further provided than the Administrator or any County Official or employee shall have the right to disclose to the Commissioner of Revenue of the State of Kentucky, or his duly authorized agent or employee, any of the information protected by Section VIII of this order, provided reciprocal right to information concerning any person liable for license fees under the provision of this order is made available to the County by such State Authorities; and provided further, that the County may publish statistics based upon information obtained in the administration of this order so long as such published statistics do not reveal the identity of any Licensee.

SECTION X.

PENALTIES FOR VIOLATIONS:

Any person who violates any of the provisions of this order, by failing to pay any license fee when due, or failing to withhold and pay any license fee when due, or failing to file any report or submit to any examination required by this order, or in any other manner fails or refuses to comply with any of the terms or provisions of this order, shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100.00, nor more than $500.00, or imprisoned for not more than thirty (30) days, or both. Such penalties shall be in addition to other penalties imposed by this order. Each failure or refusal to comply with any of the provisions of this order shall constitute a separate offense, and each day that such failure or refusal continues without compliance shall constitute a separate offense.

SECTION XI.

SEVERABILITY:

Each section and each provision of each section of this order are severable, and if any provision, section, paragraph, sentence or part thereof, or the application thereof to any person, licensee, class or group, be held unconstitutional or invalid for any reason, such holding shall not affect or impair the remainder of this order, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of every other.

SECTION XIII.

REPEALING CLAUSE:

All orders or parts thereof in conflict with the provisions of this order are hereby repealed.

SECTION XIII.

EFFECTIVE DATE:

This order shall become effective on October 23, 1986.

SECTION XIV.

This order shall be published in full in the Paducah Sun.

1ST READING October 17, 1986.

2ND READING October 23, 1986.

PASSED BY THE FISCAL COURT OF McCRACKEN COUNTY ON THE 23RD DAY OF OCTOBER, 1986.

/s/ John R. Harris
Judge/Executive
McCracken County, Kentucky

AMENDMENT TO McCRACKEN COUNTY ORDINANCE RELATING TO LICENSE FEES UPON ALL PERSONS WHO ARE ENGAGED OR EMPLOYED IN ANY TRADE, OCCUPATION OR PROFESSION WITHIN THE COUNTY OF McCRACKEN, FOR THE HEALTH, EDUCATION, SAFETY, WELFARE, AND CONVENIENCE OF THE INHABITANTS OF McCRACKEN COUNTY.

Be it Ordained by the Fiscal Court of the County of McCracken, Commonwealth of Kentucky:

That Section V (a) of the above-mentioned ordinance be amended to read as follows:

DUTY OF EMPLOYER TO WITHHOLD, REPORT AND PAY LICENSE FEES OF EMPLOYEES:

(a) It shall be the duty of every person engaged in any trade, occupation or profession, within McCracken County who employs or engages the services of others in connection therewith, to withhold from the compensation of such employee, the license fees herein provided, at the time such compensation is paid or credited; said employer shall report and pay the same to the Administrator on or before April 30, July 31, October 31, and January 31, of each year, for the license fees accrued during the preceding three months; and which quarterly withholding periods shall commence on January 1, 1987, except as provided in (b) and (c). Failure on the part of the employer to withhold, report and pay the license fees shall not relieve the employees from liability therefor.

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The foregoing amendment shall be published in the Paducah Sun on Dec. 2, 1986.

1st Reading December 11th, 1986.

2nd Reading December 22, 1986.

Passed by the Fiscal Court of McCracken County on the 22nd day of December, 1986, on motion of Commissioner Lindsey, seconded by Commissioner Orazine.

/s/ John R. Harris
McCRACKEN COUNTY JUDGE-EXECUTIVE

MCCRACKEN CIRCUIT COURT
Division No. II
Civil Action No. 87-CI-268

JIM SHOULDERS; HAROLD HAMMONS;
BEVERLY JACKSON; TROY BEAN;
JEROME CASSELL; STEVE COURTNEY;
WAYNE TRAVIS; and BUD WALTMON;

PLAINTIFFS

VS.

MCCRACKEN COUNTY, KENTUCKY;
(Serve: John Harris
Judge-Executive
Courthouse
Paducah, Kentucky)

JOHN HARRIS; FRED AUSTIN;
WAYNE LINDSEY; and DANNY ORAZINE;
(Serve each individually at:
Courthouse
Paducah, Kentucky)

and

COMMONWEALTH OF KENTUCKY;
(Serve by certified mail:
Hon. David Armstrong
Attorney General
Frankfort, Kentucky
40601)

DEFENDANTS

COMPLAINT,

PETITION
FOR
DECLARATORY
JUDGMENT

and

PETITION
FOR
PERMANENT
INJUNCTION

For their cause of action against the defendants, the plaintiffs, by counsel, state as follows:

1. That they are individuals who are employed in or who operate businesses in McCracken County, Kentucky.

2. That the defendant, McCracken County, is a local unit of government operating under and by authority of the Constitution and statutes of the Commonwealth of Kentucky.

3. That the individual defendants, John Harris, Fred Austin, Wayne Lindsey and Danny Orazine, are members of the McCracken County Fiscal Court, the governing body of McCracken County, Kentucky.

4. That the Commonwealth of Kentucky is made a party defendant herein pursuant to Kentucky Revised Statutes, Section 418.075, in that a portion of a statute enacted by the Commonwealth is alleged by the plaintiffs to be unconstitutional.

5. That on October 23, 1986, the defendants named in numerical paragraphs 2 and 3 above enacted an ordinance imposing a license fee upon all persons engaged or employed in any trade, occupation or profession within McCracken County, which ordinance became effective on January 1, 1987. Said ordinance was enacted pursuant to Kentucky Revised Statutes, Section 68.197, as amended by the defendant, Commonwealth of Kentucky, through its General Assembly during its 1986 legislative session.

6. That McCracken County, Kentucky, includes within its boundaries two municipal corporations, namely, the City of Paducah, a city of the second class, and the City of Lone Oak, a city of the sixth class.

7. That persons within the cities of Paducah and Lone

Oak are subject to all rights, privileges and responsibilities of all other persons within McCracken County, but that said cities have assumed, by their respective charters, additional rights, privileges and responsibilities over and above those provided and imposed by McCracken County.

8. That the City of Paducah has had and continues to have in effect a business license/occupational tax similar to that recently imposed by McCracken County, the proceeds of which are used for the sole and exclusive benefit of the City of Paducah, and not for the benefit of McCracken County.

9. That the aforesaid ordinance as enacted by the defendant, McCracken County, and the individual defendants purports to exempt from its operation (by Section III (e) thereof) those persons paying a business license fee or occupational tax to the City of Paducah, and that Kentucky Revised Statutes, Section 68.197, subsections (3) and (4), as enacted by the defendant, Commonwealth of Kentucky, purports to authorize such an exemption.

10. That Section 171 of the Kentucky Constitution mandates that taxes shall be uniform within the territorial limits of a particular taxing authority, such as McCracken County, and that the aforesaid ordinance and statute are therefore in violation of said section.

11. That Sections 170 and 174 of the Kentucky Constitution prohibit exemptions from taxation except as specified therein, and that said Constitution provides no exemption from occupational taxes for those persons paying a similar tax to a separate and distinct taxing authority. The aforesaid ordinance and statute are therefore in violation of said sections.

12. That Sections 59 and 60 of the Kentucky Constitution prohibit the enactment of special acts which result in unequal application of rights, privileges or responsibilities, and that the

aforesaid ordinance and statute are therefore in violation of said sections.

13. That Sections 1 and 2 of the Kentucky Constitution prohibit unequal or arbitrary treatment of persons within the jurisdiction of the Commonwealth of Kentucky, and that the aforesaid ordinance and statute are therefore in violation of said sections.

14. That Section 26 of the Kentucky Constitution declares that all laws contrary to said Constitution are void.

15. That the Fourteenth Amendment to the United States Constitution prohibits every state, including Kentucky, from denying to any person within its jurisdiction the equal protection of the laws. To permit the exemption from taxation as enacted by the defendants herein, whether by ordinance or by statute, would deny equal protection to those persons employed or engaged in business in McCracken County outside the City of Paducah, since those persons would thereby be required to bear the full tax burden, despite the fact that the proceeds of the tax would benefit the persons exempted as well as those not exempted to the same extent.

16. That Article 6 of the United States Constitution provides that said United States Constitution is the supreme law of the land, and that the judges of every state are bound thereby.

WHEREFORE, the plaintiffs pray:

a. That Kentucky Revised Statutes, Section 68.197, subsections (3) and (4) be declared contrary to the Constitution of Kentucky and the Constitution of the United States, and therefore void and of no effect;

b. That Section III (e) of the aforementioned ordinance of McCracken County be declared contrary to the Constitution of

Kentucky and the Constitution of the United States, and therefore void and of no effect;

c. That McCracken County and the Commonwealth of Kentucky be permanently enjoined from enacting an exemption from business license/occupational taxes for those persons paying a similar tax to a separate and distinct taxing authority;

d. That any and all money previously withheld from or paid by the plaintiffs by reason of the aforesaid ordinance be refunded to them, together with interest at the legal rate, in order that they not be required to pay a greater tax share than those persons employed or engaged in business in the City of Paducah; and

e. That they be granted any and all other relief to which they may appear entitled.

/s/ Stanley K. Spees
STANLEY K. SPEES
325 North 4th Street
P. O. Box 2806
Paducah, Kentucky 42002
(502) 443-8263
ATTORNEY FOR PLAINTIFFS

MCCRACKEN CIRCUIT COURT
Division No. II
Civil Action No. 87-CI-268

JIM SHOULDERS; HAROLD HAMMONS; BEVERLY JACKSON; TROY BEAN; JEROME CASSELL; STEVE COURTNEY; WAYNE TRAVIS; and BUD WALTMON;

PLAINTIFFS/APPELLANTS

VS.

NOTICE OF APPEAL

MCCRACKEN COUNTY, KENTUCKY; JOHN HARRIS; FRED AUSTIN; WAYNE LINDSEY; and DANNY ORAZINE;

DEFENDANTS/APPELLEES

For their Notice of Appeal pursuant to Civil Rule 73.03, the Plaintiffs/Appellants state as follows:

1. That the Plaintiffs/Appellants are Jim Shoulders; Harold Hammons; Beverly Jackson; Troy Bean; Jerome Cassell; Steve Courtney; Wayne Travis; and Bud Waltmon.

2. That the Defendents/Appellees are McCracken County, Kentucky; John Harris; Fred Austin; Wayne Lindsey; and Danny Orazine. Another original defendant, Commonwealth of Kentucky, was dismissed from this action by Order entered on May 12, 1987, and that Order is not the subject of appeal.

3. That the Plaintiffs/Appellants hereby appeal to the Kentucky Court of Appeals from the Order of the McCracken Circuit Court, Division No. II, entered on May 1, 1987 in Civil Action No. 87-CI-268, whereby the Honorable Ron Daniels, Circuit Judge, overruled the motion of the Plaintiffs/Appellees to disqualify himself based on appearance of bias or partiality.

4. That the Plaintiffs/Appellants hereby appeal to the Kentucky Court of Appeals from the Order and Judgment, and accompanying Conclusions of Law, of the McCracken Circuit Court, Division No. II, entered on September 14, 1987 in Civil Action No. 87-CI-268, whereby the Honorable Ron Daniels, Circuit Judge, ruled that neither the Constitution of Kentucky nor the Constitution of the United States is violated by the McCracken County Business License/Occupational Tax ordinance enacted on October 23, 1986, or by the purported enabling statute, KRS 68.197, said Order and Judgment having dismissed the Plaintiffs/Appellants' Complaint and Petition.

DATED this 12th day of October, 1987.

/s/ Stanley K. Spees
STANLEY K. SPEES
325 North 4th Street
P. O. Box 2806
Paducah, Kentucky 42002
(502) 443-8263
ATTORNEY FOR
PLAINTIFFS/APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify the foregoing Notice of Appeal has been served by mailing a true and correct copy to Hon. Fred H. Grimes, P. O. Box 2244, Paducah, Kentucky 42002, Attorney for all Defendants/Appellees, prior to the filing of said Notice of Appeal with the McCracken Circuit Court Clerk, on this the 12th day of October, 1987.

/s/ Stanley K. Spees
STANLEY K. SPEES

Supreme Court, U.S.
FILED
OCT 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-534

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIM SHOULDERS; HAROLD HAMMONS; BEVERLY JACKSON; TROY BEAN; JEROME CASSELL; STEVE COURTNEY; WAYNE TRAVIS; AND BUD WALTMON

APPELLANTS

VS.

McCRACKEN COUNTY, KENTUCKY; JOHN HARRIS; FRED AUSTIN; WAYNE LINDSEY; AND DANNY ORAZINE

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

MOTION TO DISMISS

Counsel of record for appellees:

Fred H. Grimes
McCracken County Attorney
P.O. Box 2244
Paducah, Kentucky 42002
(502) 444-4709

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MOTION TO DISMISS

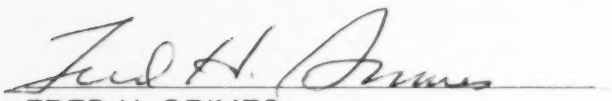
Pursuant to Rule 16, Subsections (b) and (d), Rules of the U.S. Supreme Court, the Appellees move for a dismissal of the appeal of this cause from the Kentucky Supreme Court on the grounds that it does not present a substantial federal question; that the issue raised on the appeal that a state statute authorizing a county fiscal court to enact an occupational tax upon all workers and firms within the County but providing for a credit to workers within the county who pay a like tax to a city within the county is discriminatory and oppressive against county workers and firms required to pay the tax, is upon examination of many prior decisions of this Court not a substantial Federal Question that would require plenary consideration by this Court; that a cursory examination of the statute and ordinance in question makes it evident that it falls within the long-standing policy of this Court to extend broad discretion to legislative bodies in the formulation of tax policies when there is no evidence of arbitrary, hostile or oppressive discrimination; that an equalization of the tax burden on workers within the County is clearly the stated intent and policy of the Kentucky General Assembly.

Appellees-Movants file herein their memorandum of authorities which enunciates the long-standing position of the Court that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation and that classification is a permissible device for adapting tax programs to local needs and usages when the purpose is intended to achieve an equitable distribution of the tax burden.

That the argument advanced by the Appellants that proceeds of the McCracken County Occupational tax would be used to implement projects, ie. construction of a new county jail, would be beneficial to workers in the City of Paducah who are entitled to the "tax credit", is of no consequence since this Court has long held the position that being a recipient of benefits

from the tax levies does not require equal participation in the payment of taxes which fund such benefits.

Respectfully submitted,



FRED H. GRIMES
McCracken County Attorney
P.O. Box 2244
Paducah, Kentucky 42002
ATTORNEY FOR APPELLEES-MOVANTS

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) Amendment XIV, § 1, United States Constitution

All persons born or naturalized in the United States and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) Kentucky Revised Statute § 68.197(1986)

See Exhibit I in Appendix at pages i to ii.

(3) McCracken County, Kentucky, Occupational Tax Ordinance No. 86.

See Exhibit II in Appendix at pages iii to xiii.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Fiscal Court of McCracken County enacted an occupational tax and business license ordinance on October 23, 1986. The tax levied was one percent (1%) of the gross wages of employed persons and one percent (1%) of the net profits of self-employed persons and firms. The ordinance, which became effective on January 1, 1987, was enacted pursuant to enabling legislation passed by the Kentucky General Assembly at its 1986 Session (Kentucky Revised Statute 68.197).

The ordinance enacted by McCracken County Fiscal Court, consistent with the provisions of the enabling statute, imposed the tax/license fee on all persons or firms employed or engaging in business in McCracken County but provided for a tax credit to the extent of any similar tax paid to a city within the County.

The City of Paducah, a municipality within the boundaries of McCracken County, already had an occupational tax/license in effect which exacted one and one half percent (1½%) of the gross earnings of the employed within the city limits and a license fee imposed on the self-employed persons and firms which was based upon a classification of businesses and occupations determined by the gross receipts of such persons and firms.

Appellants herein challenged the McCracken County occupational tax/license on the basis that it violated various provisions of the Kentucky Constitution principally on the uniformity of taxation section of the State Constitution, as well as claiming the statute and ordinance was violative of the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution.

Their suit filed in the McCracken Circuit Court was dismissed on a Motion for Summary Judgment filed by the Appellees herein.

Appellants herein appealed to the Kentucky Court of Appeals. The case was removed to the Kentucky Supreme Court on motion of Appellees and the Court subsequently ruled that the McCracken County occupational tax/license ordinance and its enabling statute (Ky. Rev. Stat. 68.197) neither violated the Kentucky nor U.S. Constitution. The Kentucky Supreme Court upheld the statute and ordinance by a 6-1 vote.

Appellants then filed their Notice of Appeal to this Honorable Court as well as their Jurisdictional Statement.

Appellants predicate their appeal to this Court solely on the grounds that the tax credit granted workers in McCracken County for payment of a like tax to the City of Paducah unfairly discriminates against the workers in McCracken County, outside of the City of Paducah, on the theory that the workers in Paducah are not sharing an equal tax burden with county workers.

This Court has long and consistently stated its position that the judiciary should not sit as a super legislature to judge the widom or desirability of legislative policy determinations made in areas that do not affect fundamental rights, particularly in local economic spheres. As Justice O'Connor stated in her dissenting opinion in Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985),

> ". . . it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."

See also New Orleans v. Dukes, 427 U.S., at 303-304, 49 L Ed. 2d 511-17, 96 S. Ct. 2513 (1976).

This Court, in 1940, stated its well established position which it had maintained for over 50 years, that

> "the broad discretion as to classification possessed by a legislature in the field of taxation

> has long been recognized. This Court fifty years ago concluded that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden . . . .
>
> Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."

Madden v. Kentucky, 309 U.S. 83, 84 L. Ed. 590, 60 S. Ct. 406, 125 ALR 1383 (1940).

Appellants have labored mightily to paint a picture of a hostile legislature which has oppressively discriminated against the people employed in McCracken County outside the City of Paducah; they refuse to accept the fact that the Kentucky General Assembly, by enacting Ky. Rev. Stat. 68.197, was merely exercising the sound discretion vested in it for the purpose of equalizing the tax burden among the employed throughout McCracken County, and other counties of Kentucky.

This Court had previously stated in Carmichael v Southern Coal & Coke Co., 301 U.S. 494, 81 L. Ed. 1245, 57 S.Ct. 868 (1937), that imposition of a tax on employers to pay into a state Unemployment Compensation Fund was not violative of the Fourteenth Amendment.

In the case of Kahn v. Shevin, 416 U.S. 351, 40 L. Ed. 2d 189, 94 S. Ct. 1734 (1974), this Court upheld a Florida statute which granted an annual $500.00 property tax exemption to widows, residents of Florida, but not to widowers. In this case the Court stated,

> "A state tax law is not arbitrary although it discriminates in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy, not in conflict with the Federal Constitution."

In the case at bar, a credit, not an exemption, is granted by the McCracken County Occupational tax ordinance to workers in the City of Paducah who are paying a similar tax, which is an even greater tax than county workers are paying. Without the credit, urban workers would be paying two and one half times as much as non-urban workers.

Again, in demonstrating the broad discretion the judiciary gives to a legislative body when there is clear and convincing rationale behind the enactment of legislation, this Court held in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 49 L. Ed. 2d 520, 96 S.Ct. 2562 (1976), that a state statute which retired state police officers at age 50, was not violative of Equal Protection Clause of the Fourteenth Amendment. In this case, the Court said,

> "But where rationality is the test, a state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect."

While divided, 5-4, this Court upheld a very controversial Texas School Financing plan as not violative of the Fourteenth Amendment or Equal Protection Clause in the case of San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973).

The sum and substance of the above cited cases, as well as many others, is a clear recognition of the Court's belief in granting broad discretion to state legislatures in the formulating of sound tax policies. In the instant case, the soundness of the policy of the Kentucky General Assembly in enacting Ky. Rev. Stat. 68.197 which provided for a tax credit to workers paying a like tax to a city within a county imposing an occupational tax on all workers and businesses in the county is evident. This is neither hostile nor oppressive because the legislative intent and policy was apparent; that its only purpose was to equalize the tax burden on workers and firms within a particular county, a permissible classification which this Court has long recognized as not violative of the Equal Protection Clause.

Predicated upon the cases cited which recognize and affirmatively state the position of this Court to tax policies of the state legislatures, where there is no arbitrary or hostile discrimination against the workers within a county subject to an occupational tax which would be in conflict with the Fourteenth Amendment, these Appellees-Movants pray the Court to dismiss the appeal of the Appellants herein, and that these movants be awarded their costs herein expended.

Respectfully submitted,

FRED H. GRIMES
Attorney for Appellees

CERTIFICATE OF SERVICE

Pursuant to Rule 28.3, 28.4(c) and Rule 28.5(6), of the United States Supreme Court Rules, I, Fred H. Grimes, a member of the United States Supreme Court Bar, hereby certify that the foregoing Motion to Dismiss, with memorandum of authorities, has been served upon all parties to this action in the following manner:

(a) Upon the appellants, Jim Shoulders, Harold Hammons, Beverly Jackson, Troy Bean, Jerome Cassell, Steve Courtney, Wayne Travis and Bud Waltmon, by depositing three (3) copies in a United States post office, with first-class postage prepaid, addressed to their counsel of record, Stanley K. Spees, 325 North 4th Street, P.O. Box 2806, Paducah, Kentucky 42002, Attorney for Appellants; and

(b) Upon the Commonwealth of Kentucky by depositing three (3) copies in a United States post office, with first-class postage prepaid, addressed to Attorney General of Kentucky, Hon. Fredric J. Cowan, Jr., 120 State Capitol, Frankfort, Kentucky 40601; on this the

21st day of October, 1988.

Fred H. Grimes

FRED H. GRIMES
Attorney for Appellees

EXHIBIT I K.R.S. 68.197. License fees on franchises, businesses, occupations or professions in counties of 30,000 or more—Credit of city license fee against county license fee.—(1) The fiscal court of each county having a population of thirty thousand (30,000) or more, may by order or resolution impose license fees on franchises, provide for licensing any business, trade, occupation or profession, and the using, holding or exhibiting of any animal, article or other thing. License fees on such business, trade, occupation, or profession for revenue purposes, except those of the common schools, may be imposed at a percentage rate not to exceed one percent (1%) of:

(a) Salaries, wages, commissions and other compensation earned by persons within the county for work done and services performed or rendered in the county;

(b) The net profits of self-employed individuals, partnerships, professional associations, or joint ventures resulting from trades, professions, occupations, businesses or activities conducted in the county; and

(c) The net profits of corporations resulting from trades, professions, occupations, businesses or activities conducted in the county.

In order to reduce administrative costs and minimize paperwork for employers, employees and businesses, the fiscal court may provide:

(a) For an annual fixed amount license fee which a person may elect to pay in lieu of reporting and paying the percentage rate as provided in this subsection on salaries, wages, commissions and other compensation earned within the county for work done and services performed or rendered in the county; and

(b) For an annual fixed amount license fee which an individual, partnership, professional association, joint venture or corporation may elect to pay in lieu of reporting and paying the percentage rate as provided in this subsection on net profits of businesses, trades, professions or occupations from activities conducted in the county.

Licenses imposed for regulatory purposes are not subject to such limitations as to form and amount. No public service company that pays an ad valorem tax is required to pay a license tax, and no license tax shall be imposed upon or collected from any insurance company, bank, trust company, combined bank and trust company, combined trust, banking and title business in this state, or any savings and loan association whether state or federally chartered, or in other cases where the county is prohibited by law from imposing a license tax.

(2) No such license fee shall be imposed or collected on income received by members of the Kentucky national guard for active duty training, unit training assemblies and annual field training.

(3) Persons who pay a county license fee pursuant to this section and who also pay a license fee to a city contained in the county may upon agreement between the county and the city, credit their city license fee against their county license fee.

(4) The provisions of subsection (3) of this section notwithstanding, effective with license fees imposed under the provisions of subsection (1) of this section on or after July 15, 1986, persons who pay a county license fee and a license fee to a city contained in the county shall be allowed to credit their city license fee against their county license fee. (Enact. Acts 1966, ch. 263, § § 1,2; 1968, ch. 152, § 40; 1974, ch. 113, § 1; 1976, ch. 301, § 3; 1978, ch. 268, § 1, effective June 17, 1978; 1986, ch. 131, § 1, effective July 15, 1986.)

EXHIBIT II McCRACKEN COUNTY ORDINANCE NO. 86

AN ORDER RELATING TO LICENSE FEES UPON ALL PERSONS WHO ARE ENGAGED OR EMPLOYED IN ANY TRADE, OCCUPATION OR PROFESSION WITHIN THE COUNTY OF McCRACKEN, FOR THE HEALTH, EDUCATION, SAFETY, WELFARE AND CONVENIENCE OF THE INHABITANTS OF McCRACKEN COUNTY,

BE IT ORDERED AS FOLLOWS:

SECTION I.

DEFINITIONS: WORDS AND PHRASES USED IN THIS ORDER SHALL HAVE THE ORDINARY AND ACCEPTED MEANING ASCRIBED TO THEM AND THE SPECIAL MEANINGS ASCRIBED TO THEM BELOW:

(a) The phrase "license fee" shall mean a tax for the privilege of exercising the right to engage in trade, occupation or profession for compensation paid by others or the right to engage in trade, occupation or profession, for oneself, for profit or gain, within McCracken County, Kentucky.

(b) The word "person" shall mean and include all natural persons, partnerships, firms, associations, governmental bodies and agencies, and corporations, and whenever used in any interpretation.

(c) "Administrator" means an official administrator of the occupational tax, to be appointed by the McCracken County Fiscal Court.

SECTION II.

EFFECTIVE DATES AND DURATION:

This order shall apply and be effective from and after January 1, 1987, and shall remain in full force and effect until repealed or modified in a lawful manner.

SECTION III.

LICENSE FEES REQUIRED:

(a) All persons engaged in any trade, occupation or profession, within McCracken County, when employed by another, shall pay a license fee measured by and equal to one percent (1%) of gross receipts paid for such service.

(b) All persons engaged in any trade, occupation, or profession, within McCracken County, for themselves, for profit or gain, shall pay a license fee measured by and equal to one percent (1%) of the net profit realized from such activity. "Net Profit" as used herein shall mean gross receipts less ordinary business deductions, recognized as such, and allowed by the laws of the Commonwealth of Kentucky, in computing income tax liability, but without deductions for taxes based on income. It shall be unlawful for any person to engage in any trade, occupation or profession within McCracken County without withholding, reporting and paying the license fees herein provided and required. Portions of this order prescribing a penalty in the form of fine or imprisonment, shall mean and include the individual members of a firm, partnership or association and the officers of any governmental body or agency, or any corporation.

(c) The words and phrases "trade, occupation or profession" shall include any and all activities and the rendering of any and all services of all kinds or other remuneration, or net profit or gain of any kind when applied to persons so engaged for themselves

whether the person be a resident of McCracken County or not.

(d) The word "County" means McCracken County, Kentucky, and includes the cities of Paducah and Lone Oak.

(e) All persons engaged in any trade, occupation or profession, when employed by another, and all persons engaged in any trade, occupation or profession, for themselves, within the territorial boundaries of the City of Paducah, and paying a license fee to the City of Paducah for the privilege of working or engaging in a business or profession within the City of Paducah, shall be entitled to credit for such fees paid to the City of Paducah against the fees imposed by McCracken County, Kentucky.

(f) The phrase "gross receipts" and the word "compensation" when applied to a person employed by others shall have the same meaning and shall include the gross amount of all salaries, wages, commissions, bonuses or other money payments of any kind, or other considerations having a monetary value, which a person receives or becomes entitled to, or is given credit for by an employer, without deduction for withholding taxes, social security benefits, any form of insurance or retirement benefits, or other deductions made by an employer in calculating "take home-pay" provided however that any traveling expenses actually incurred and paid by the employer, gratuities such as "tips" paid by someone other than the employer, and wages, salaries or other compensation received by domestic servants employed in a private home, shall be exempt from the operation of this order.

(g) The singular shall include the plural, the plural

shall include the singular, the masculine or feminine shall include both and the neuter genders whenever susceptible to such.

SECTION IV.

REGULATION, ADMINISTRATION, ENFORCEMENT AND COLLECTION OF LICENSE FEES AND THE PURPOSE THEREOF:

It shall be the duty of the Administrator to collect all license fees and deposit the same in the General Fund of McCracken County, to be used to defray the general expenses of the County Government. The Administrator shall have the power, and it shall be his duty to make and publish such rules and regulations as may be necessary to administer this order and to provide such printed forms as may be required for reporting, paying and receipting all such license fees and for all other requirements in the proper and efficient administration of this order.

SECTION V.

DUTY OF EMPLOYER TO WITHHOLD, REPORT AND PAY LICENSE FEES OF EMPLOYEES:

(a) It shall be the duty of every person engaged in any trade, occupation or profession, within McCracken County who employes or engages the services of others in connection therewith, to withhold from the compensation of such employee, the license fees herein provided, at the time such compensation is paid or credited; said employer shall report and pay the same to the Administrator on or before April 30, July 31, October 31 and January 31, of each year, for the license fees accrued during the preceding three months beginning July 1, 1987, except as

provided in (b) and (c). Failure on the part of the employer to withhold, report and pay the license fees shall not relieve the employees from liability therefor.

(b) A person engaged in agriculture business (raising crops and livestock) who employ less than five (5) employees on a regular time basis, (four-hundred fifty (450) hours during a quarter), may file a return and pay the withholding tax at the end of the taxable year.

(c) Any person may elect to estimate and pay in advance, the withholding tax that may become due from compensation to be paid employees for a taxable year.

This procedure will exempt the person from filing quarterly returns. The penalty for underpayment will be as provided in sub-section (d) below.

(d) All license fees not paid when due shall draw interest at the rate of twelve percent (12%) per annum from due date until paid, and upon failure to pay any license fee when due, a penalty of ten percent (10%) is hereby imposed which penalty shall draw interest from due date.

SECTION VI.

DUTY OF PERSON ENGAGED IN TRADE, OCCUPATION OR PROFESSION FOR ONESELF TO REPORT AND PAY LICENSE FEES:

It shall be the duty of every person engaged in any trade, occupation or profession for themselves, for gain or profit, within the County, to file with the Administrator a return showing the net profit or gain from such activity realized during the preceding year as determined by the Licensee's method of accounting or keeping books, and shall pay the license herein

provided, calculated on the net profit for such preceding fiscal year. Within 105 days after the end of the Licensee's fiscal year following January 1, 1987, such person shall file a report with the Administrator showing the net profit or gain for the preceding license period.

The first license period shall extend from January 1, 1987, until the end of the Licensee's fiscal year, and the license fee for that period shall be calculated on a pro-rated basis as of the end of the Licensee's fiscal year. The Licensee shall be permitted to adopt any fiscal period which corresponds with his system of accounting or bookkeeping, or the period adopted for income tax purposes.

SECTION VII.

DUTY OF EMPLOYEE WHEN EMPLOYER FAILS TO WITHHOLD, REPORT OR PAY:

In the event an employer fails to withhold, report or pay license fees for which any employee is liable, then it shall be the duty of the employee to report and pay the same when due and to file reports showing total gross receipts for the period from January 1, 1986, to December 31, 1986, and thereafter annually. Said reports shall be made upon forms furnished by the Administrator and shall be filed not later than April 15th of each year. In the event the Licensee has not paid the full amount of license fees due for any period, the deficit, together with interest and penalties, must be paid when the reports above provided for are filed or the amount legally determined by the Administrator. In the event of overpayment, McCracken County shall make prompt refund.

SECTION VIII.

APPORTIONMENT OF LICENSE FEES WHERE COMPENSATION OR NET PROFIT IS DERIVED FROM ACTIVITY BOTH WITHIN AND WITHOUT THE COUNTY:

Whenever any employee receives compensation for services or activity performed both within and without the County, the license fee required under this order shall be computed and paid upon the basis of the proportion of compensation earned for services performed within the County.

Whenever the net profit or gain from any trade, occupation or profession is derived from activity or business done within and without the County, the license fee required under this order shall be computed and paid upon the proportion of net profit or gain derived from activity within the County.

In all cases of license fees computed upon the basis of apportionment of compensation or net profit or gain, as herein provided, the apportionment may be shown by the sworn statements of the licensee or employer, but shall not be binding upon the County. Said apportionment shall be subject to verification and determination by the Administrator or his agents or employees through examination and audit of the books and records of the licensee or employer, or both, as required by the Administrator.

SECTION IX.

RECORDS REQUIRED:

The reports required by this order shall be in form prescribed by the Administrator and shall contain all essential information, date and figures, upon which the license fees required by this order are computed. Every person required to pay any license fee provided by this order shall be required to make all books, records and accounts upon which information required by this order is based, available to the Administrator, his agents or employees, for the purpose of examination, audit or verification; provided however, that if any licensee or employer, subject to the provisions of this order, shall voluntarily submit copies of income tax returns for examination, then in such case no further examination or audit will be required until and unless

there is re-examination or audit made by the taxing authority to whom the return was made; and provided further, the Administrator may dispense with examination of the books, records, accounts, or tax returns of the licensee in any case where the Administrator is furnished with a certificate of any attorney at law, a licensed public accountant, or the sworn statement of any other accountant or bookkeeper of the licensee stating that the amount of tax reported conforms to the income tax return filed by the licensee for the applicable period.

Nothing herein shall prevent or preclude the Administrator from conducting an examination and audit of the books, records, and accounts, as herein provided at any time he may have reasonable grounds to believe that the Licensee has not correctly reported and paid the license fees due under the provisions of this order.

All information obtained by the Administrator or any of his agents or employees, or any other official or employee of McCracken County, from any reports, examination or audit of books, records, accounts, income tax returns, or any other source, in the administration of this order, shall be treated and considered as confidential and privileged except for official purposes, unless otherwise treated by judicial decree or specific provision of law, and shall not be open to inspection by the public.

Any official, agent or employee of McCracken County who divulges any information obtained under the provision of this order, except for the purposes of administering this order as herein provided, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than $100.00, not more than $500.00, or punished by confinement for not more than thirty (30) days, or both.

It is further provided that the Administrator or any County Official or employee shall have the right to disclose to the Commissioner of Revenue of the State of Kentucky, or his

duly authorized agent or employee, any of the information protected by Section VIII of this order, provided reciprocal right to information concerning any person liable for license fees under the provision of this order is made available to the County by such State Authorities; and provided further, that the County may publish statistics based upon information obtained in the administration of this order so long as such published statistics do not reveal the identity of any Licensee.

SECTION X.

PENALTIES FOR VIOLATIONS:

Any person who violates any of the provisions of this order, by failing to pay any license fee when due, or failing to withhold and pay any license fee when due, or failing to file any report or submit to any examination required by this order, or in any other manner fails or refuses to comply with any of the terms or provisions of this order, shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100.00, nor more than $500.00, or imprisoned for not more than thirty (30) days, or both. Such penalties shall be in addition to other penalties imposed by this order. Each failure or refusal to comply with any of the provisions of this order shall constitute a separate offense, and each day that such failure or refusal continues without compliance shall constitute a separate offense.

SECTION XI.

SEVERABILITY:

Each section and each provision of each section of this order are severable, and if any provision, section, paragraph, sentence or part thereof, or the application thereof to any person, licensee, class or group, be held unconstitutional or invalid for any reason, such holding shall not affect or impair the remainder of this order, it being the legislative intent to

ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of every other.

SECTION XII.

REPEALING CLAUSE:

All orders or parts thereof in conflict with the provisions of this order are hereby repealed.

SECTION XIII.

EFFECTIVE DATE:

This order shall become effective on October 23, 1986.

SECTION XIV.

This order shall be published in full in the Paducah Sun.

1ST READING October 17, 1986.

2ND READING October 23, 1986.

PASSED BY THE FISCAL COURT OF McCRACKEN COUNTY ON THE 23RD DAY OF OCTOBER, 1986.

/s/ John R. Harris
Judge/Executive
McCracken County, Kentucky

AMENDMENT TO McCRACKEN COUNTY ORDINANCE RELATING TO LICENSE FEES UPON ALL PERSONS WHO ARE ENGAGED OR EMPLOYED IN ANY TRADE, OCCUPATION OR PROFESSION WITHIN THE COUNTY OF McCRACKEN, FOR THE HEALTH, EDUCATION, SAFETY, WELFARE, AND CONVENIENCE OF THE INHABITANTS OF McCRACKEN COUNTY.

Be it Ordained by the Fiscal Court of the County of McCracken, Commonwealth of Kentucky:

That Section V (a) of the above-mentioned ordinance be amended to read as follows:

DUTY OF EMPLOYER TO WITHHOLD, REPORT AND PAY LICENSE FEES OF EMPLOYEES:

(a) It shall be the duty of every person engaged in any trade, occupation or profession, within McCracken County who employs or engages the services of others in connection therewith, to withhold from the compensation of such employee, the license fees herein provided, at the time such compensation is paid or credited; said employer shall report and pay the same to the Administrator on or before April 30, July 31, October 31, and January 31, of each year, for the license fees accrued during the preceding three months; and which quarterly withholding periods shall commence on January 1, 1987, except as provided in (b) and (c). Failure on the part of the employer to withhold, report and pay the license fees shall not relieve the employees from liability therefor.

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The foregoing amendment shall be published in the Paducah Sun on Dec. 2, 1986.

1ST READING December 11th, 1986.

2ND READING December 22, 1986.

PASSED BY THE FISCAL COURT OF McCRACKEN COUNTY ON THE 22ND DAY OF DECEMBER, 1986, ON MOTION OF COMMISSIONER LINDSEY, SECONDED BY COMMISSIONER ORAZINE.

/s/ John R. Harris
McCRACKEN COUNTY JUDGE-EXECUTIVE

Supreme Court, U.S.
FILED
NOV 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-534

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIM SHOULDERS; HAROLD HAMMONS;
BEVERLY JACKSON; TROY BEAN;
JEROME CASSELL; STEVE COURTNEY;
WAYNE TRAVIS; AND BUD WALTMON

APPELLANTS

VS.

MCCRACKEN COUNTY, KENTUCKY;
JOHN HARRIS; FRED AUSTIN;
WAYNE LINDSEY; AND
DANNY ORAZINE

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

BRIEF OPPOSING MOTION TO DISMISS

Counsel of record for appellants:

Stanley K. Spees
P.O. Box 2806
Paducah, Kentucky 42002
(502) 443-8263

TABLE OF AUTHORITIES

Brown-Forman Co. v. Kentucky, 217 U.S. 563, 54 L.Ed. 883, 30 S.Ct. 578 (1910) 3
Kenney v. Comptroller, 222 U.S. 525, 56 L.Ed. 299, 32 S.Ct. 105 (1912) 3
Ohio Oil Co. v. Conway, 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930) 2

BRIEF OPPOSING MOTION TO DISMISS

The appellees herein have filed a motion to dismiss which purports to be based on Rule 16.1 (b) and (d) of this Court. Specifically, the appellees allege that the appeal in this action fails to present a substantial federal question. Appellants submit that the appellees' motion itself refutes such a proposition.

First it should be noted that the appellees' approach to the issue is one in which they cite several cases they believe to support the legislation the appellants have challanged as unconstitutional. One can see immediately that an approach of this kind is more nearly suited for a motion to affirm under Rule 16.1(c). If the cases the appellees cite really do hold that their actions are in accord with Fourteenth Amendment Equal Protection, a motion to affirm would place this Court in a position to note that fact and to thereby ratify, or affirm, the decision of the Kentucky Supreme Court.

By citing so many prior decisions of this Court which deal with the issue of local and state taxation, the appellees have demonstrated that such issue, rather than *not* being a substantial federal question, is in fact *so substantial* that this Court has deemed it necessary time and again to speak to the issue. The content of this motion contradicts its premise. Therefore their motion to dismiss clearly must be denied. Moreover, they chose not to file a motion to affirm; thus they cannot be granted relief in that manner.

It should also be noted that what the appellees have done in their motion to dismiss is to argue the merits of their case. They fail to mention even a single reason why they believe no substantial federal question is presented. Again, their citations of authority indicate exactly the opposite. They do, from the opposing point of view, what the appellants were not permitted to do in their jurisdictional statement, and that is

to show why the appellees, and the Kentucky courts, are in error about the tax credit issue. The appellants, of couse, are prepared to respond in kind, but in compliance with the Rules of this Court are reserving their citations and arguments for the brief on the merits and oral argument. Unlike the appellees, appellants are aware that the brief and the oral argument are the proper places to state their case, and that the documents now before the Court are intended to demonstrate why this case should reach that stage.

Even thought the appellees have not adhered to proper procedure, the appellants feel that they have no choice but to respond to the thrust of the appellees' argument, *viz.*, that the Commonwealth of Kentucky and the County of McCracken were merely exercising discretion in formulating the challenged tax credit device, and that such discretion should not be disturbed by this Court. Appellees seem to believe that legislative discretion is virtually unbridled simple because the law-making authorities are closer to the problem than is this Court. The fallacy of this belief is pointed out in *Ohio Oil Co. v. Conway*, 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930), wherein this Court stated,

> "With all this freedom of action [enjoyed by the states with respect to the exercise of their taxing power], there is a point beyond which the State cannot go without violating the equal protection clause."

Next the appellees implicitly admit that the tax credit scheme would be unconstitutional if arbitrary or if hostile or oppressive to the appellants, and then proceed to state why they believe it is not arbitrary, hostile or oppressive. Again, this agrument goes to the merits of the case and the appellants' side has not yet been presented in this Court. A substantial federal question is presented on that point, however, as shown

by *Kenney v. Comptroller,* 222 U.S. 525, 56 L.Ed. 299, 32 S.Ct. 105 (1912):

> "The 14th Amendment . . . requires that in [the state's] exercise [of its taxing power] the citizen . . . shall not, by arbitrary and discriminatory provisions, be denied equal protection."

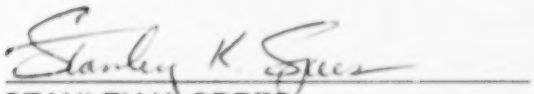
Finally the appellees extract from a case a sentence which recognizes that not all taxing statutes can be perfect in every respect, and insinuate that the sentence, and thus this Court, condone "imperfect" classifications. Obviously, that idea is absurd when put forth to suggest a law-making body can intentionally discriminate in an arbitrary manner against one or more individuals as in the case at bar. While some tax statutes may have relatively minor defects which cannot be easily cured, the glaring defect in the appellees' tax credit scheme can be rectified by a simple change even as the overall integrity of the tax ordinance is maintained. To make that change would protect the constitutional rights of every McCracken County taxpayer, and thereby bring the ordinance within the restriction enunciated in *Brown-Forman Co. v. Kentucky,* 217 U.S. 563, 54 L.Ed. 883, 30 S.Ct. 578 (1910):

> "Fundamental to the very existence of the governmental power of the states as is this function of taxation, it is nevertheless subject to the restriction that it shall not be so exercised as to deny *to any* the equal protection of the law." [Emphasis added.]

In summary, then, the appellees' motion to dismiss should be overruled because (a) it does not set forth a single reason supporting its premise that the case does not present a substantial federal question; (b) this Court's treatment of tax

issues in the past, as cited by the appellees, reinforces the notion that a substantial federal question is presented by this case; (c) the motion is structured as a motion to affirm, but does not seek that relief and thus must be denied; and (d) the validity of the classification made by the state and local governments is an issue which needs to be briefed and argued before the Court in order for the respective arguments to be fully addressed.

Respectfully submitted,



STANLEY K. SPEES
325 North 4th Street
P. 0. Box 2806
Paducah, Kentucky 42002
(502) 443-8263
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

Pursuant to Rule 16.5, 28.3 Rule and Rule 28.5(b) of the United States Supreme Court Rules, 1, Stanley K. Spees, a member of the Bar of the United States Supreme Court, hereby certify that the foregoing Brief Opposing Motion to Dismiss has been served upon all parties required to be served in the following manner:

(a) Upon the appellees, McCracken County, Kentucky; John Harris; Fred Austin; Wayne Lindsey; and Danny Orazine, by depositing three (3) copies in a United States mailbox, with first-class postage prepaid, addressed to their counsel of record, Fred H. Grimes, Esquire, McCracken County Courthouse, Paducah, Kentucky 42001, Attorney for Appellees; and

(b) Upon the Commonwealth of Kentucky by depositing three (3) copies in a United States mailbox, with first-class postage prepaid, addressed to the Attorney General of Kentucky, Hon. Fredric J. Cowan, Jr., 120 State Capitol, Frankfort, Kentucky 40601;

all on this the 3RD day of November, 1988.

Stanley K. Spees

STANLEY K. SPEES